The appeal of the Public Prosecutor is therefore allowed and the order of the learned Judge is set aside. However, we understood from the Senior Federal Counsel that the respondent in this case had already been acquitted by the Sessions Court and although our ruling would be academic for this case, we have decided to deliver this judgment as a guide for similar cases in the future.

TAN SRI KHOO TECK PUAT & ANOR.
v.
PLENITUDE HOLDINGS SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TUN DATO[1] SERI HJ. ABDUL HAMID BIN HJ. OMAR LP, TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), DATO' HJ. MOHD. EUSOFF CHIN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-281-92]
23 FEBRUARY 1993

APPEAL: Principles governing an appellate Court's jurisdiction to interfere with a lower Court's findings of fact - Whether there was misdirection of himself by the trial Judge - Whether the trial Judge's conclusion was plainly wrong.

The appellants and the respondent entered into a sale and purchase agreement wherein the appellants agreed to sell and the respondent agreed to buy an estate land at a price of RM47,939,958. The respondent failed to pay the balance of the purchase price within the contractual period and the appellants terminated the agreement and forfeited the deposit.

The trial Court found in favour of the respondent and on appeal the question that arose was whether the appellate Court was entitled to interfere with the findings of the trial Judge.

Held:

[1] There was no misdirection of himself by the learned Judge. The printed evidence showed that the Judge's conclusions were justified.

[2] Sitting without the privilege of the trial Judge who heard and tried the case, it could not be concluded that the learned Judge, who saw and heard the witnesses, was plainly wrong.

[3] There was no grounds to disagree with the learned Judge on his findings of fact based on the evidence adduced and there was no reason for interfering with his judgment.

[Appeal dismissed].

[**Bahasa Malaysia** Translation of Headnote]

RAYUAN: Prinsip-prinsip yang menguasai bidang kuasaMahkamah rayuan untuk campur tangan dalam kedapatan fakta oleh Mahkamah rendah - Sama ada Hakim perbicaraan menyalaharahkan dirinya - Sama ada kesimpulan Hakim perbicaraan adalah jelas salah.

Perayu dan responden telah memasuki suatu perjanjian jual dan beli di mana perayu telah bersetuju untuk menjual dan responden telah bersetuju untuk membeli sebidang tanah estet dengan harga RM47,939,958. Responden telah gagal untuk membayar baki harga jualan dalam tempoh kontraktual dan perayu telah menamatkan perjanjian tersebut dan melucuthak deposit berkenaan.

Mahkamah perbicaraan membuat kedapatan memihak kepada responden dan atas rayuan persoalan yang timbul ialah sama ada Mahkamah rayuan berhak untuk campur tangan dalam kedapatan oleh Hakim perbicaraan.

Diputuskan:

[1] Hakim yang bijaksana tersebut tidak menyalaharahkan dirinya. Keterangan yang bercetak itu menunjukkan bahawa kesimpulan Hakim yang bijaksana tersebut adalah berjustifikasi.

[2] Bersidang tanpa keistimewaan Hakim perbicaraan yang telah mendengar dan membicarakan kes tersebut, tidak boleh disimpulkan bahawa Hakim yang bijaksana itu, yang melihat dan mendengar saksi-saksi berkenaan, adalah jelas salah.

[3] Tiada alasan untuk tidakbersetuju dengan kedapatan fakta oleh Hakim yang bijaksana tersebut berdasarkan kepada keterangan yang dikemukakan dan tiada alasan untuk campur tangan dalam penghakimannya.

[Rayuan ditolak].

Cases referred to:

Webb v. Hughes [1870] LR10EQ281 ***(cit)***
Stickney v. Keeble [1915] AC 386 ***(cit)***
Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. [1964] 30 MLJ 87 ***(foll)***
Watt or Thomas v. Thomas [1947] 1 ALL ER 582 at p. 587 ***(foll)***
Clarke v. Edinburgh & District Tramways Co. Ltd. [1919] SC (HL) 35,37 ***(foll)***
Chew Boon Ee v. L. Ramanathan Chettiar & Ors. ***[1959] 25 MLJ 235 (refd)***

For the appellants - P. Royan (Robert Lai Poh Fye and Ng Thian Woon with him); M/s. Jackson & Masacorale
For the respondent - Wong Kim Fatt (M. Pathmarajah with him);M/s. Gulam & Wong

JUDGMENT

Gunn Chit Tuan CJ (Malaya):

By a sale and purchase agreement dated 20 August 1984 (p. 275 of the appeal records) Rumah Nanas Rubber Estate Sdn. Bhd. (the second appellant) agreed to sell to Plenitude Holdings Sdn. Bhd. (the respondent) an estate land at the price of RM47,939,958. The respondent paid a deposit of 10% amounting to RM4,793,995.80 but failed to pay the balance purchase price within the contractual period of six months or within the extended completion periods. The second appellant then terminated the said agreement and forfeited the said deposit by a letter dated 12 December 1988 (p. 309 of the appeal records).

One of the issues raised in the Court below was whether the second appellant and Tan Sri Khoo Teck Puat (the first appellant) in order to induce the respondent to enter into the said sale and purchase agreement had represented orally to the respondent that the appellants undertake to obtain a loan from the National Bank of Brunei or another source for the respondent to enable it to complete the sale and purchase of the said estate land free of encumbrances and with vacant possession, and that if the loan could not be obtained the second appellant would enter into a joint venture with the respondent to develop the said estate land.

The learned trial Judge concluded that on the evidence the respondent had proved that the first appellant, who was DW1 in the Court below, had made the alleged representations and gave three reasons for arriving at his conclusion. The learned Judge in his grounds of judgment stated that the respondent, with a paid up capital of RM5 million was unlikely to have agreed to the terms of the sale and purchase agreement unless the first appellant had unequivocally given an oral undertaking to secure a loan for the respondent. The learned Judge also considered that it was in the appellants' interest for the respondent to secure the loan for in such event the appellants could complete the sale of the land at a price substantial enough to benefit the appellants. His Lordship also found that there were serious doubts as to the credibility of the first appellant.

On appeal to the Supreme Court it was contended that despite the learned Judge's declaration that he had considered the contemporaneous documentary evidence his Lordship did

not refer to any of the relevant correspondence appearing between pp. 289 to 355 of the appeal records and that when tested against those contemporaneous documents and the overall probabilities, it was not likely that any of the alleged representations were made by the first appellant. It is true that the learned Judge did not refer individually to those letters but in his judgment (p. 52 of the appeal records) his Lordship did state as follows:

> On the evidence, both oral and on the contemporaneous documentary evidence, I can only conclude as a fact that the plaintiffs have proved on a balance of probabilities that DW1 had promised to secure a loan for the plaintiffs and that in the event that such loan could not be secured he had given an undertaking to join the plaintiffs in a joint venture scheme to develop the said land.

On this issue of fact we note that the learned Judge had considered and accepted the oral evidence of one Yap Chui Kui (PW1) and had rejected the evidence of the first appellant, who was DW1, especially in the light of glaring contradictions by the first appellant in respect of his resident director, one Encik Sohaimi (p. 240 of the appeal records) who was not called as a witness by the defence.

Another issue raised was whether the notice of termination dated 12 December 1988 issued by the second appellant's solicitors to the respondent was valid and proper. The learned Judge held that the said notice was not a reasonable notice and that the contract was never legally terminated. It was again the contention of the appellants that the Judge had not considered the relevant contemporaneous evidence appearing between p. 301 and p. 388 of the appeal records. It was contended that the agreement had lapsed and that if the respondent wanted to purchase the land, it was subject to new terms. It was also contended that the respondent's inability to complete the purchase of the said land entitled the second appellant to terminate the agreement.

On the other hand it was contended by the respondent that the letter of 12 December 1988 (p. 309 of the records) gave absolutely no notice whatsoever to the respondent. The appellants had waived their rights and time was no longer the essence of the contract after 3 1/2 years. Counsel for the respondent contended that the learned Judge was right in holding that the termination of the agreement was unlawful and that the learned Judge had considered this issue very carefully in the light of evidence and authorities before him (pp. 56 to 63 of the appeal records) and that the learned Judge also repeated his findings in his grounds of judgment as follows: (p. 84 of the appeal records)

> Again at the risk of repetition I would say that since the plaintiffs were unable to raise a loan either on their own volition or by the default of the first defendant company, time no longer constituted the essence of the contract, as evident by the negotiations that continued between the parties. If the defendants had considered time of the essence they ought to have given a reasonable notice of then - intention to abandon the contract if the balance of the purchase price was not paid. (*Webb v. Hughes* [1870] LR 10 EQ 281, *Stickney v. Keeble* [1915] AC 386). The plaintiffs as can be seen from the evidence never abandoned the agreement expressly or impliedly.

As regards the principles on which an appellate Court may interfere with a lower Court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] 30 MLJ 87 in which his Lordship stated as follows:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a Judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582 at p. 587.
>
> I. Where aquestion of fact has been tried by a Judge without a jury, and there is no question of misdirection ofhimselfby the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper

> advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd.* [1919] SO (HL) 35, 37:

> In my opinion, the duty of an appellate court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Applying the above principles in reviewing the decision of the Court of first instance in this case, we did not find any misdirection of himself by the learned Judge and we ourselves are not disposed to come to a different conclusion on the printed evidence in the appeal records as we do not have the advantage enjoyed by the trial Judge of having seen and heard the witnesses. We were satisfied from the printed evidence that the trial Judge's conclusions are justified having put to ourselves the question whether sitting without the privilege of the trial Judge who heard and tried the case, could we come to the conclusion that the learned Judge, who saw and heard the witnesses, was plainly wrong? As we could not come to that conclusion, it is therefore our duty to defer to his judgment.

Having reviewed this case as a whole and having considered the arguments of Counsel on both sides we were not prepared to disagree with the learned Judge on his findings of facts based on the evidence adduced and found no reason for interfering with his judgment *(Chew Boon Ee v. L. Ramanathan Chettiar & Ors.* [1959] 25 MLJ 235).

The appeal was therefore dismissed with costs and we also ordered the balance of the purchase price to be paid by the respondent to the appellants within six months from the date hereof.